COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

Appeal No. 2004AP2386 **Cir. Ct. No. 2003CV424**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ALISON M. WELIN,

PLAINTIFF,

V.

ELIZABETH A. PRYZYNSKI, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, HONEYWELL INTERNATIONAL AND ACUITY,

DEFENDANTS,

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

WAUSAU BENEFITS,

THIRD-PARTY DEFENDANT,

JOSHUA J. OPICHKA,

THIRD-PARTY DEFENDANT-CROSS CLAIMANT-APPELLANT,

V.

HASTINGS MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 VERGERONT, J. The issue on this appeal is whether this policy definition of "underinsured motor vehicle" may validly preclude all underinsured motorist (UIM) coverage for this UIM insured, Joshua Opichka. The definition, in essence, compares the UIM limits of Opichka's policy to the limits of the tortfeasor's liability policy without regard to whether the tortfeasor is liable to another person injured in the accident, as is the case here. We conclude that, as applied to Opichka, the definition is inconsistent with the recognized purposes of UIM coverage because it deprives him of *all* UIM benefits even if the amount he receives under the tortfeasor's liability policy is less than the UIM limits and does not fully compensate him for his damages. We further conclude, based on the facts before us, that the amount of UIM coverage available to Opichka is the UIM policy limit less the amount he has received from the tortfeasor. We therefore reverse the order of the circuit court dismissing Opichka's third-party complaint against his UIM insurer and remand for further proceedings consistent with this decision.

BACKGROUND

¶2 Opichka was a passenger in a car operated by Elizabeth Pryzynski. Pryzynski fell asleep at the wheel and her car crossed the centerline, striking a car driven by Alison Welin. There is no dispute that the accident was caused solely by Pryzynski's negligence. Opichka sustained serious injuries, some of them permanent, and Welin was also seriously and permanently injured.

¶3 Pryzynski was insured at the time by Secura Insurance under a liability policy with a single combined limit of $300,000 ($300,000 per person and $300,000 per accident). Opichka was insured by Hastings Mutual Insurance Company under a policy providing UIM coverage with limits of $150,000 per person and $300,000 per accident.

¶4 Welin sued Pryzynski and Secura, and Secura, in turn, filed a third-party complaint, asking for a declaratory ruling that the damages claimed by Opichka and Welin exceeded Pryzynski's $300,000 policy and no other liability coverage was available to her. Secura paid its policy limits to the court and asked the court to determine the allocation between Pryzynski and Opichka.

¶5 Opichka filed a third-party complaint against Hastings Mutual, claiming UIM coverage. Hastings Mutual filed a motion for a declaratory ruling that there was no UIM coverage for Opichka because Pryzynski's car did not meet the definition of an underinsured motor vehicle in the policy: "a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage." Relying on ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 456 N.W.2d 597 (1990), and ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, 245 Wis. 2d 134, 628 N.W.2d 916, Hasting Mutual argued that this

definition was unambiguous. According to Hastings Mutual, because the limits of Pryzynski's liability policy were greater than those of Opichka's UIM policy—$300,000 per person as compared to $150,000 per person—the requirements of this definition were not met.

¶6 The circuit court agreed with Hastings Mutual and granted its motion. Accordingly, it entered an order dismissing Opichka's third-party complaint against Hastings.

¶7 All parties have since stipulated that Welin's injuries and damages exceed $250,000[1] and Opichka's injuries and damages exceed $50,000; the exact damages sustained by each remain to be litigated. In that same stipulation, Welin and Opichka agreed to a $250,000/$50,000 split of the $300,000 from Pryzynski's liability policy.

DISCUSSION

¶8 On appeal, Opichka renews the arguments he made in the circuit court, which the circuit court did not address after it concluded the policy definition of underinsured motor vehicle was unambiguous. We address only one of Opichka's arguments.[2] He contends that the definition, when applied to deny

[1] We note that the stipulation states that "Welin's injuries and damages exceed $250,000,000." However, Opichka states in his reply brief that all parties stipulated that "Welin's damages exceed the $250,000 she received from said coverage." We therefore assume the $250,000,000 amount stated in the stipulation was a typographical error. However, even if it is not, neither the analysis nor the result of this opinion would change.

[2] Opichka makes these additional arguments that we do not address: (1) the definition of underinsured motor vehicle as applied to him is an impermissible "other insurance" provision in violation of WIS. STAT. § 631.43(1); (2) the definition is contextually ambiguous and therefore must be construed in his favor; and (3) the definition as applied to him violates public policy.

him all UIM coverage regardless of what he has recovered from Pryzynski, is in effect a reducing clause that is prohibited by WIS. STAT. § 632.32(4m)(d) and 5(i).[3] Instead, he asserts, the amount of UIM coverage available to him is the difference between what he has received from Pryzynski's liability policy and the $150,000 limit of his UIM policy.

¶9 Hastings Mutual responds that the statutory provisions on which Opichka relies are inapplicable and ***Smith***, 155 Wis. 2d 808, and ***Taylor***, 245 Wis. 2d 134, on which the circuit court relied, are controlling. According to Hastings Mutual, because each of those cases held that an identically worded definition of underinsured motor vehicle was unambiguous, that result is compelled here. Hastings Mutual does not dispute that a portion of Pryzynski's policy limits had to be paid to Welin nor that the amount paid to Opichka was appropriate; Hastings Mutual also does not contend that the amount paid to Opichka will be sufficient to compensate him for his damages. Hastings Mutual's position is that it is irrelevant whether Pryzynski's liability policy limits must be divided between Opichka and Welin and irrelevant whether Opichka ends up recovering from both sources less than the $150,000 limit of his UIM policy, even if his damages are more.

¶10 Resolution of these issues requires the application of case law, statutes, and insurance policy provisions to undisputed facts, all questions of law, which we review de novo. ***Van Erden v. Sobczak***, 2004 WI App 40, ¶¶11, 22, 271 Wis. 2d 163, 677 N.W.2d 718 (statutes and insurance policy provisions);

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Brown v. State, 230 Wis. 2d 355, 363-64, 602 N.W.2d 79 (Ct. App. 1999) (statutes and case law).

¶11 We agree with Opichka that ***Smith*** and ***Taylor*** do not resolve the issue in this case. In ***Smith***, the limit of the insured's UIM policy was $50,000 and the limit of the tortfeasor's liability policy was also $50,000. 155 Wis. 2d at 809. The court held that the definition of "underinsured motor vehicle" was unambiguous, the tortfeasor's vehicle plainly did not meet that definition, and "the terms of the UIM coverage [were not] otherwise prohibited by statute." ***Id.*** at 811, 813. In ***Taylor***, the court concluded that ***Smith*** governed and the same definition was thus unambiguous. 245 Wis. 2d 134, ¶¶11-13. In rejecting certain of the insured's arguments there the court noted that the insured was not arguing "that any section, or combination of sections, in each UIM policy issued by American Family violates Wis. Stat. § 631.43 or any other statute." ***Id.***, ¶23.

¶12 In ***Smith*** and ***Taylor*** there was only one injured person in each case, and, thus, in each case the UIM insured had available the full limits of the tortfeasor's liability policy; in fact, in each case the tortfeasor's insurer paid the $50,000 limits to the UIM insured. The question therefore did not arise whether the definition of "underinsured motor vehicle" would violate any statutory provision if applied to preclude all UIM coverage to an insured in the position of Opichka. In an analogous situation we have recognized that, although the definition of "uninsured motor vehicle" had been held to be ambiguous under one set of facts, it was not ambiguous when applied to a different set of facts. ***State Farm Mut. Ins. Co. v. Gillette***, 2001 WI App 123, ¶¶20-21, 246 Wis. 2d 561, 630 N.W.2d 527, *aff'd on other grounds*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662. So, too, the same definition of "underinsured motor vehicle" may conflict with statutory prohibitions under one set of facts but not under another.

¶13 Because neither ***Smith*** nor ***Taylor*** resolve the issues on this appeal, and because it appears that no Wisconsin case has addressed this definition of underinsured motor vehicle in circumstances similar to this case, we turn our attention to Opichka's statutory argument: that the definition as applied to him is in effect a reducing clause prohibited by WIS. STAT. § 632.32(4m)(d) and 5(i), when read together.

¶14 WISCONSIN STAT. § 632.32(4m)(a)1. requires insurers who write motor vehicle liability policies to provide insureds notice of the availability of UIM coverage and a brief description, if the insured's policy does not contain that coverage.[4] If an insured accepts that coverage, the insurer must include in the policy UIM coverage "in limits of at least $50,000 per person and $100,000 per accident." Section 632.32(4m)(a)2.(d). Thus, although UIM coverage is not mandatory, once the insured opts for UIM coverage, § 632.32(4m) sets the minimum amount of coverage at $50,000 per person, $100,000 per accident. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶3 n.1, 245 Wis. 2d 186, 629 N.W.2d 150. The statute does not, however, define "underinsured motor vehicle."

¶15 WISCONSIN STAT. § 632.32(5)(i), which was enacted at the same time as subsec. (4m),[5] provides:

> (i) A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily

[4] The insurer is required to provide this notice one time to one insured under each policy that goes into effect after October 1, 1995, and in conjunction with the delivery of the policy. WIS. STAT. § 632.32(4m)(a)1.

[5] Both were enacted by 1995 Wis. Act 21.

> injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.
>
> 2. Amounts paid or payable under any worker's compensation law.
>
> 3. Amounts paid or payable under any disability benefits laws.

¶16 Opichka's Hastings Mutual policy contains a reducing clause that exactly tracks WIS. STAT. § 632.32(5)(i). Opichka argues that the effect of the definition of underinsured motor vehicle as applied to him is to permit a reduction in his UIM limits by amounts not specified in § 632.32(5)(i)—amounts paid to the other injured party under the tortfeasor's policy. Opichka finds support for his argument in ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557, and ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223.

¶17 In ***Dowhower***, the supreme court discussed both WIS. STAT. § 632.32(4m) and (5)(i) in the context of a constitutional challenge to the latter. The insured challenged subsec. (5)(i) as a violation of substantive due process because it permitted, in the insured's view, the insurer to set forth a limit of UIM liability in the policy that the insurer would never actually pay, and, thus, rendered the coverage illusory. 236 Wis. 2d 113, ¶16. The court concluded that subsection did not allow illusory coverage, but instead allowed one type of reducing clause—"a reduction coverage reducing clause." ***Id.***, ¶17. The court explained that "[w]ith this approach 'the purpose of underinsured motorist coverage is solely to put the insured in the same position he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the

insured.'" ***Id.***, ¶18 (citations omitted). The court rejected the insured's argument that § 632.32(4m) guaranteed a reasonable insured who purchased $50,000 in UIM coverage the full $50,000 from the UIM insurer. Instead, the court said, when § 632.32(5)(i) was read together with § 632.32(4m)(a)2., they "establish that the UIM coverage limit purchased by the insured is reached by the combination of contributions from all legally responsible sources." ***Id.***, ¶20.

¶18 The ***Dowhower*** court then reviewed prior cases that had held reducing clauses void on the ground that they resulted in illusory coverage, which was held to be against public policy. ***Id.***, ¶¶23-32. One such situation occurred when the UIM limits were $25,000, given that WIS. STAT. § 344.33(2) requires drivers in Wisconsin to have liability coverage of at least $25,000. ***Id.***, ¶25 (discussing, *e.g.*, ***Hoglund v. Secura Ins.***, 176 Wis. 2d 265, 500 N.W.2d 354 (Ct. App. 1993)). The ***Dowhower*** court pointed out that the legislature had eliminated this situation with the passage of WIS. STAT. § 632.32(4m). ***Id.***, ¶26. As for the cases involving situations in which the insured would receive some but never all of the UIM policy's stated coverage, the legislature had expressed a different view of public policy than had the courts by enacting § 632.32(5)(i). ***Id.***, ¶¶32-33. The ***Dowhower*** court concluded:

> When we consider these cases in conjunction with Wis. Stat. § 632.32(5)(i)1, we conclude that an insurer may reduce payments made pursuant to a UIM policy by amounts received from other legally responsible persons or organizations, provided that the policy clearly sets forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by combining payments made from all sources.

Id., ¶33.

¶19 In ***Badger Mutual***, the court again discussed the purpose of UIM coverage, this time in the context of deciding that a particular reducing clause,

though consistent with WIS. STAT. § 632.32(5)(i), was ambiguous in the context of the entire policy. The court observed that over the years there had "been much uncertainty surrounding the purpose and function of UIM coverage," and it identified the "two conflicting theories regarding the purpose and function of UIM coverage." 255 Wis. 2d 61, ¶¶16-17. Under the first theory, "the purpose is to compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver …"; the insured purchases "coverage for his or her damages in a set dollar amount 'above and beyond the liability limits of the at-fault driver.'" ***Id.***, ¶17 (citations omitted). Under the second theory, the one referred to in ***Dowhower***,

> "the purpose of underinsured motorist coverage is solely to put the insured in the same position as he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured." Under this theory, UIM coverage operates as a predetermined, fixed level of insurance coverage including payment from both the at-fault driver's liability insurance and the insured's own UIM coverage.

Id., ¶18 (citations omitted). The legislature's intent as expressed in § 632.32(5)(i), the ***Badger Mutual*** court said, is that this second theory "is not invalid per se." ***Id.***, ¶33.

¶20 The court in ***Badger Mutual*** then elaborated on its discussion in ***Dowhower***:

> Implicit in our determination that reducing clauses would be valid only if they "provided that the policy clearly sets forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by combining payments made from all sources" was a recognition that the reasonable insured might not understand, intuitively, the scope of his or her UIM coverage. We signaled in ***Dowhower*** that UIM insurers that reduce UIM payments by amounts paid from other sources, are required to make clear to purchasers of UIM coverage that they are

> purchasing coverage that will put them in the same position they would be in if the underinsured tortfeasor had liability limits equal to the amount of UIM coverage the insured purchased. *Insureds will then understand that if they want to be assured of having, say, $200,000 in total available coverage, they will have to purchase UIM coverage with a $200,000 limit.*

Id., ¶38 (emphasis added).

¶21 More recently, this court stated that both ***Dowhower*** and ***Badger Mutual*** "are based on the [supreme] court's understanding that Wis. Stat. § 632.32(5)(i) refers to payments made *to the insured*," and we held that this subsection unambiguously permits reduction by those payments specified only if they are paid or payable to the insured or the insured's heirs or estate. ***Teschendorf v. State Farm Ins. Cos.***, 2005 WI App 10, ¶13, ___ Wis. 2d ___, 691 N.W.2d 882.

¶22 From these cases we draw the following principles. The legislature has sanctioned the second theory of the purpose and function of UIM coverage—under which the UIM limit may be reduced by other sources—only if: (1) the sources are limited to those specified in WIS. STAT. § 632.32(5)(i), and (2) those permissible sources are paid or payable to the insured or the insured's heirs or estate, and (3) the insurance policy clearly sets forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by combining the statutorily permissible sources and UIM payments to the extent necessary to reach that fixed level. At the same time, the first theory of the purpose and function of UIM remains viable, though an insurer is not required to provide UIM coverage that fulfills that purpose if the policy meets the above three conditions. *See* ***State Farm Mut. Auto Ins. Co. v. Gillette***, 2002 WI 31, ¶¶44-47, 251 Wis. 2d 561, 641 N.W.2d 662 (recognizing that UIM coverage has both purposes described in the

case law, but a policy need not necessarily provide coverage to fulfill both those purposes).

¶23 Hastings Mutual argues that ***Dowhower***, ***Badger Mutual***, and WIS. STAT. § 632.32(5)(i) are not relevant because they concern a reducing clause, not the definition of "underinsured motor vehicle." However, as we have explained, the two cases do more than discuss reducing clauses; they also explain the recognized purposes of UIM coverage. In addition, a proper analysis does not ignore the effect of the definition simply because of its label. In ***Mau v. North Dakota Ins. Reserve Fund***, 2001 WI 134, ¶33, 248 Wis. 2d 1031, 1054, 637 N.W.2d 45, the court recognized that the occupancy requirement in the policy's definition of "named insured" was not couched in terms of an exclusion; but, because it produced the same result as an exclusion, the court treated it as an exclusion for purposes of applying a statutory prohibition on certain coverage exclusions. In this case, the effect of applying the definition of "underinsured motor vehicle" without regard to the amount actually available to Opichka under Pryzynski's policy has the same effect as reducing the UIM limits by amounts not paid or payable to him. It is therefore appropriate to analyze the definition under the case law and statute addressing permissible reducing clauses.

¶24 We conclude that the purposes of UIM coverage under both theories are thwarted by the definition of "underinsured motor vehicle" when applied to Opichka to deny him all UIM coverage regardless of the amount actually available to him under Pryzynski's liability policy. Opichka has purchased a fixed level of UIM coverage—$150,000—but, even though the statutorily permissible other sources he receives are less than that and do not fully compensate him, he does not

get the fixed level he purchased because there is another injured person to whom the tortfeasor is liable.[6] And it goes without saying that denying Opichka all UIM coverage for that reason, even if his damages exceed what he receives from the tortfeasor, does not fulfill the purpose of UIM coverage under the first theory. In short, tying the availability of UIM coverage to the amount of the tortfeasor's liability limits, even when a portion of those funds are paid to another claimant, is not consistent with any theory of UIM coverage that has been recognized by Wisconsin courts or approved by the legislature. For this reason, we conclude the definition of "underinsured motor vehicle" is invalid if it compares the UIM limits to the limits of Pryzynski's liability policy without taking into account the amount available to Opichka after payment to Welin. If that amount *is* taken into account, Pryzynski's vehicle is underinsured: the limits of her liability policy, reduced by payment to another claimant, is less than the UIM limits of Opichka's policy.

¶25 Of course, the reducing clause in Opichka's UIM policy applies to reduce the UIM limits by the $50,000 Opichka received from Pryzynski. Accordingly, based on the facts before us, the reduced limit of UIM coverage available to Opichka is $100,000.

By the Court.— Order reversed and cause remanded.

Recommended for publication in the official reports.

[6] When we refer to "another injured person to whom the tortfeasor is liable," we mean a person—like Welin—who is not insured under the same UIM policy as Opichka. We do not address the situation in which the injured persons are insureds under the same UIM policy.